

December 1, 1958

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CONCORD, N.H.

Walter G. White, Chairman  
Water Resources Board  
State House Annex  
Concord, New Hampshire

Dear Mr. White:

This is in reply to your letter of November 7, 1958 relative to a petition filed by Mr. Robert E. Webber seeking permission to place fill in Phillips Pond in Sandown, New Hampshire along 140 ft. of shoreline and extending 25 ft. into the water.

You have submitted a summary of the public hearing which was held in connection with this petition on October 29, 1958, from which it appears that Mr. Webber's plan also contemplates the excavation of a 30 ft. channel parallel to the brook which abuts on the east, the area sought to be filled, and the dredging of a swamp area which is to be filled with sand to form a beach.

In your letter you state that the purpose of the excavation is to develop a boat basin and to procure material for fill, neither of which appear to be objectionable, and that the abutting owners who were present at the hearing have no objection to this work.

Mr. Francis Moore, Engineer for the Water Resources Board, has reported that he has examined the site and found that the area to be excavated is State owned land below high water mark, but that he found nothing contrary to the public interest.

You have inquired whether both filling and excavating can be treated at the same time in your recommendations to the Governor and Council. We answer in the negative.

We are assuming that Phillips Pond has an area in excess of ten acres in its natural state and that Mr. Webber's petition was filed pursuant to RSA 482:41-a-c (supp). From a careful reading of these sections it is clear that they were designed to apply solely to the placement of fill below the mean high water level of public waters. We find nothing in these sections or elsewhere in the statute expressly or impliedly granting to the Governor and Council, or the Water Resources Board, any authority to restrict, regulate or control the excavation of the beds of public waters. Accordingly

Walter G. White, Chairman  
Water Resources Board

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we are of the opinion that the question of whether Mr. Webber may or may not excavate below the high water level of Phillips Pond is governed by common law.

While the beds of great ponds "... are held in trust by the State for public use ..." (RSA 271:20) it is well established that a littoral owner has rights which are more extensive than those of one who is only a member of the public. State v. Stafford Company, 99 N.H. 92, 97; Musgrove v. Cicco, 96 N.H. 141; Dolbeer v. Company, 72 N.H. 562.

"That the shore owner has rights incidental to the enjoyment of public rights in the lake and which are more extensive than those of one who is only a member of the public, is a settled matter of recognition in the law.

"The principles out of which this usage sprang are common to both countries; namely, the exclusive right of access to the water over his banks, enjoyed by the riparian owner; his title to the soil gained from the sea by imperceptible accretion or alluvion . . . from which are necessarily deduced the doctrines that none but the riparian owner can erect such wharves and other conveniences for navigation . . . ' Clement v. Burns, 43 N.H. 609, 617. 'The dictates of justice and reason, which retain in the government, for common use, the fee of large ponds, . . . have vested a reasonable private right of using this public property in the owners of the adjoining land.' Concord & Co. Company v. Robertson, 66 N.H. 1, 18. 'As the owner of the adjoining land, the plaintiff had the right to build wharves and other structures into the pond for his own use,' without unreasonable interference with the public rights. Dolbeer v. Company, 72 N.H. 562, 565." Hoban v. Bucklin, 85 N.H. 85, 87, 88.

"An abutter's use of the bed of a public water, like a riparian owner's use of a fresh river flowing over his land is governed by the rule of reasonableness applied to the facts of his case."

Concord Co. v. Robertson, 66 N.H. 1, 18

Applying the principles expressed in the foregoing cases we conclude that Mr. Webber as owner of the adjoining shoreline (assuming him to be such) may excavate below the high water mark provided such excavation is incidental to the use and enjoyment of his shore property, and provided further that such excavation does not constitute an unreasonable interference with rights of the public in the waters and bed of Phillips Pond. Of course, a binding determination of whether excavation constitutes an unreasonable interference with public rights may be made only by the court in any given case.

Very truly yours,

George T. Ray, Jr.  
Assistant Attorney General

GTR, Jr/m  
Dictated but not read